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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Yuba)

THE PEOPLE,

Plaintiff and Respondent,

v.

KELLIE LYNN JOHNSON,

Defendant and Appellant.

C063168

(Super. Ct. No.
CRF06144)

This is an appeal pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).

Defendant Kellie Lynn Johnson pleaded no contest to unlawfully burning an inhabited structure (Pen. Code, § 452, subd. (b)), in exchange for the dismissal of a count of arson (Pen. Code, § 451, subd. (b)) and a promise of no state prison at the outset. As part of the plea, she also admitted violating probation in an earlier DUI case. The factual basis of the plea shows that on February 23, 2006, defendant was drinking at her ex-boyfriend's house, and after he left, she recklessly set a fire, burning his house.

The trial court granted defendant probation, pursuant to the plea bargain.

At the request of the probation department, a condition that defendant enter a residential drug treatment program was modified, to allow her to participate in other drug programs, and a jail term was modified to time served.

Defendant admitted she violated probation because she was rejected by a treatment program for submitting three dirty urine samples, one for marijuana and two for methamphetamine. The trial court reinstated defendant on probation. Defendant waived all past custody credits.

Defendant later admitted she violated probation again, by possessing alcohol, using methamphetamine, and possessing a lighter.

The trial court denied further probation and sentenced defendant to the upper term of four years in prison, in part based on her recidivism. Defendant timely filed this appeal. The trial court denied her request for a certificate of probable cause.

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (See *Wende*, *supra*, 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief. More than 30 days elapsed, and we received no communication from defendant.

Pursuant to this court's miscellaneous order No. 2010-002, filed March 16, 2010, we deem defendant to have raised the issue (without additional briefing) of whether amendments to Penal Code section 4019, effective January 25, 2010, apply retroactively to her pending appeal and entitle her to additional presentence credits. As expressed in the recent opinion in *People v. Brown* (2010) 182 Cal.App.4th 1354, we conclude that the amendments do apply to all appeals pending as of January 25, 2010. Defendant is not among the prisoners excepted from the additional accrual of credit. (Pen. Code, § 4019, subds. (b)(2) & (c)(2); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.) Consequently, defendant having served 97 days of presentence custody not waived, is entitled to 96 days of conduct credits, instead of the 48 days awarded under prior law. (See Pen. Code, § 4019, subds. (b), (c), & (f); *People v. Marquez* (2003) 30 Cal.4th 14, 25-26 [rounding up not permitted].) We modify the judgment to award defendant 97 days of actual credits and 96 days of conduct credits.

Having undertaken an examination of the entire record, we find no other arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is affirmed as modified. The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation a new abstract of judgment.

HULL, J.

We concur:

BLEASE, Acting P. J.

CANTIL-SAKAUYE, J.